IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

WEDNESDAY, THE 19TH DECEMBER 2007 / 28TH AGRAHAYANA 1929

Bail Appl..No. 7160 of 2007()

AGAINST THE ORDER DATED 29/11/2005 IN CRMP 170/2005 IN SC.701/2003 of ADDL.D.C.(SPL.COURT FOR TRIAL FOR MARADU CASES) KOZHIKODE

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PETITINER

ABDUL LATHEEF
THEKKEPURATH HOUSE, CHETTIPADY, MALAPPURAM DISTRICT.

BY ADV. SRI.P.S.ABDUL KAREEM

RESPONDENTS:

STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA,ERNAKULAM.

BY D.G.P. SRI. P.G. THAMPI.
SRI.P.K.RAMKUMAR

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON 19/12/2007 ALONG WITH BA NO. 7162 OF 2007 THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

R. BASANT, J.

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B.A.Nos. 7160 & 7162 of 2007

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Dated this the 19th day of December, 2007

O R D E R

The massacre at Marad remains a blot on the secular credentials of the composite culture of the Keralite. Deep indeed is the indignation and the sense of shame aroused in the secular public mind of Kerala. Emphatic, strict and determined action was called for. Investigation was promptly conducted by a Special Investigation Team and the final report was filed in time to avoid even the risk of the accused claiming bail by default under the proviso to Section 167(2) Cr.P.C.

2. The incident took place on 2.5.2003. Final report was filed on 31.7.2003. Special Sessions Court was constituted to undertake the trial in the case. The trial commenced on 20.12.2004. Section 313 examination of the accused commenced on 22.11.2006 and after quite a long innings came to an end on 13.8.2007 Thereafter the defence evidence commenced. It was closed on 18.10.2007. Arguments started on 1.11.2007.

Hearing of the arguments is going on. 252 witnesses have been examined by the prosecution. 7 defence witnesses have been examined. CWs. 1 to 7 were examined as court witnesses. Exts.P1 to P788 have been marked by the prosecution. Exts.D1 to D57 were marked on the side of the accused and Exts. C1 to C10 were marked as court exhibits. MOs. 1 to 365 have also been marked. The total number of pages of the deposition is 5500, reports the learned Special Judge.

3. The adage, Bail and not Jail is the rule in criminal proceedings is well entrenched in our system of criminal jurisprudence. But that rule is also one that knows and admits exceptions. Altogether 142 accused persons face trial in this case, it is submitted, of which 137 are in judicial custody, including the two petitioners herein. The petitioners herein are accused Nos. 94 and 98. They have remained in custody from 15.9.2003 (A94) and from 21.5.2003 (A98). They had come to this Court earlier with a prayer for grant of anticipatory bail and regular bail later. Those applications were dismissed. One of them came to this Court with a grievance that

he is entitled to be acquitted at the stage of Section 232 Cr.P.C. That prayer was also not accepted and the same was dismissed as per order dt. 5.10.2007 in Crl.M.C. No. 3077 of 2007. Courts, including this Court, have felt that considering the various circumstances, including the gruesome nature of the alleged offence, the alleged depravity of mind of accused and the sense of outrage and scars that this gruesome crime had left behind in the public mind, this case must fall within the exception to rule that bail and not jail must be the normal course.

4. The exception must also certainly have its limits. Trial has been going on for the past more than 3 years, but still the end is not in sight. When the petitioners came before this Court with this petition, a report of the learned Special Judge was called for. The learned Special Judge in his report dt. 27.11.2007 - after the arguments had commenced on 1.11.2007 - reports that "if other things being equal a further time of approximately 10 months will be required for the final disposal of the case." Two months further time is claimed for argument of the prosecution. Two months further time for reply of the

defence and another six months for preparation and delivery of the judgment.

5. Notice was given to the learned Prosecutor. The learned D.G.P. has himself entered appearance before this Court to resist the prayer for grant of bail. The learned D.G.P. submits that considering the peculiar facts and circumstances of this case, bail may not be granted to the petitioners, notwithstanding the fact that the petitioners have remained in custody for long periods of time. He submits that he is opposing the application with a heavy heart, fully conscious of the consequences that rejection of bail is working out for the persons who face trial and are detained pending trial. But the learned D.G.P. submits that the release of any of the accused persons on bail would hamper the smooth further course of the trial and it would become virtually impossible for the trial court also to dispose of the caseas per the schedule fixed. It is hence requested that bail may not be granted to the petitioners at this final stage. The learned D.G.P. submitted that he had had a discussion with the Special Prosecutors and it is reported that irreducible further time of two months for the

prosecution and two months for the defence to complete the arguments in the case is required, according to them.

6. The crime and the outrage it created is indeed gross and gruesome. But certainly a refined system of law must respond not in the language of the offender, but in a sublime manner. Such emotions cannot weigh with this Court at this stage. At the initial stage, considering the peculiar facts of the case and scars which the offence had created in the psyche of the polity, it was absolutely essential to insist that the accused persons should not be granted bail. But I am afraid, the approach to the claim for bail now must certainly be different. The trial is over. All that remains is hearing of arguments and pronouncement of judgment. If it cannot be ensured that the delivery of judgment will take place within a short period of time, certainly this Court will have to think of other alternatives that are available.

7. This Court had considered the sad plight of the accused facing incarceration pre-trial and therefore in B.A.No. 231 of 2007 the learned Special Judge was requested to submit periodical weekly

reports about the progress of the case. Progress was being reported and monitored. I agree with the learned Special Judge that the case is one of gigantic preparation. The work is indeed great. But according to me, it is not just or proper to insist that the petitioners must remain in custody for all time until the judgment is pronounced at an uncertain future distant date.

8. A counsel, Adv. P.K. Ramkumar, had entered appearance on behalf of the victims. He was permitted to advance his arguments. The learned counsel submits that it may be that some of the accused may ultimately be entitled to claim acquittal, but such acquittal and release may be only on the basis of judicial verdict on the basis of the evidence adduced and at this stage no opinion may be expressed on the acceptability or sufficiency of the material. The case may not be considered on merits now by this Court, submits counsel.

9. This court cannot be insensitive on the plight of the persons undergoing imprisonment awaiting judgment. They are in custody for about four years. For another 10 months atleast, it is now certain, they

will have to remain in custody to get the verdict, if they are not released on bail.

10. I must alertly remind myself that expression of opinion on merits about the acceptability or sufficiency of materials at this stage is bound to create negative and improper impressions. I shall not hence proceed even to consider the materials available in evidence or embark on a discussion about the acceptability of the allegations raised. The learned D.G.P. was requested to specifically explain the precise nature of the allegations against the petitioner, i.e. A94 and 98. It is admitted that the petitioners are not persons, who had actually taken part in the massacre that took place on 2.5.2003. They had no role in the actual offence committed on 2.5.2003. The learned D.G.P. has placed before this court the nature of the allegations and materials against the petitioners/A94 and A98. I shall extract what the learned D.G.P. has stated about the role of A94 and 98:

> "A94 Abdul Latheef is a resident of Chettippady. He was the member who carried bomb from sea at Marad to the Mosque at Marad (Pepsi Tin Bombs). This is spoken to

by PW18 Devadasan, and this accused was identified by PW18 Devadasana before the court during trial. These bombs were recovered from the Mosque as per Ext.P209 search list, on search conducted by PW211 Abdul Rahim, Asst. Commissioner of Police (South), Kozhikode City in the presence of PW124 Balan, RDO, PW177 Koyakutty, Thahsildar, Kozhikode and PW219Abdul Hameed, CI of Police, Cheruvannur.

There is unimpeachable evidence for this recovery from the Mosque.

The bomb was defused by PW189 Kannan who has deposed that Gelatin stick contains Nitroglycerine, detonator fuse oil, gun powder etc. and iron nails were also detected. This bomb was used while attacking PW1 Sugunan and another bomb exploded and injured two persons and nail was operated out from the leg of PW46 Abhilash by the doctor PW175 A.T. Rajeev from Calicut Medical College.

After the incident on 2.5.03, he absconded and surrendered before the court only on 15.9.03 (after the charge sheet was filed). A co-accused who helped him to manufacture the bomb, Accused No.95 Koyamon is still absconding. The explosives used for manufacturing the

bomb were purchased from the shop of PW24 Shamsudeen with the help of PW22 Muhammed Haji."

So far as A98 is concerned, the learned D.G.P. states that:

"The main role of Accused No.98 Sakkeer in the offence is being a member of the conspiracy held at Marwa Palace, Kozhikode on 31.3.03, which is the last conspiratorial meeting. At that conspiracy the date of attack on Arayans and the necessary help for the injured were finalised. He is also implicated by the 164 Statement of PW35 Ashraf but during trial, he failed to identify the accused in the dock.

Besides this, accused's name is seen written in a pocket diary seized by PW236, S. Sankaranarayanan, Dy.S.P., CBCID, Kozhikode from the pocket of Accused No.97 Moideen Koya who had taken the room at Marwa Palace for conspiracy. This diary entry shows the names of accused who participated at the conspiracy at Marwa Palaceon 31.3.03. This diary is marked as Ext.P59. The relevant entry is extracted in Ext.P60 mahazar. PW38 P.K. Anilkumar and CW 63 are the attesters to this mahazar. This witness, PW38 P.K. Anilkumar has identified A97 Moideen koya in the dock. The case of the prosecution is

that A98 Sakkeer had also participated in the conspiracy held at Marwa Palace."

These are extracts from the report submitted to the learned D.G.P. by the investigating Officer/Special Public Prosecutor.

11. The learned D.G.P. opposes the applications of both the petitioners on the broad general contention that "if bail is granted, there is every chance of them jumping the bail and once the case is split up, it could not be completed without delay and excessive expenses. Further this is a case conducted on a day to day basis." It is further submitted that the release of the petitioners on bail shall open the flood gate of demands by many other accused.

12. I have only adverted to the nature of the contentions raised by the learned D.G.P. The learned counsel for the petitioners disputes this assertion and submits that there is no worthwhile acceptable evidence against the petitioners.

13. Be that as it may, I am not embarking on an attempt to resolve that controversy now, lest any observation made by this Court may influence the court which is to appreciate the evidence adduced

and take decision. It is certainly the burden of the system to ensure that the right to speedy trial of an accused guaranteed under Article 21 of the Constitution is safeguarded. A court considering the prayer for grant of bail must also be informed of the constitutional principles which safeguard the freedom and liberty of the individual. Where trial goes on endlessly and the person is compelled to undergo incarceration awaiting the final verdict, that also works out injustice. Such law, which compels a person to remain in custody cannot come under the classification of just and reasonable law. I am satisfied, in the facts and circumstances, of this case, considering the nature of the allegations against the petitioners that the petitioners can be granted regular bail. Appropriate conditions can, of course, be imposed, which shall ensure the interests of justice and also allay the apprehension aired by the learned D.G.P.

14. Bail conceptually is a process in law under which a person in custody is handed over to the custody of sureties, who must undertake the responsibility of ensuring that the accused person does not flee from justice and shall be available before Court to help the

court to proceed further. Certainly conditions can be imposed by this Court to ensure that this concept is put into effect strictly. Appropriate conditions can therefore be imposed.

15. These petitions are accordingly allowed. The petitioners shall be released on bail on the following terms and conditions.

1) They shall execute bonds for Rs.2,00,000/- (Rupees two lakhs only) each with three solvent sureties, of which one must be a blood relative of the petitioner, and the remaining two solvent sureties to the satisfaction of the learned Special Judge.

2) The petitioners shall reside at a place to be specified by them even before they are released on bail within 3 kms. of the Court building of the Special Judge until the judgment is pronounced finally.

3) Atleast one of the sureties shall be present with the accused at all times. The sureties, or any one of them, shall bring the accused to the Court on every date of posting and taking them from the Court to the place of residence.

4) The petitioners shall not travel to any other place except from Court to the place of residence and from the place of residence to Court

accompanied by the sureties or any one of them.

5) They shall not meet, contact or interact with any one other than their counsel or close relatives i.e. parents, spouses, children or siblings or any other person the Special Judge may approve on their request. A statement shall be filed by the petitioners of all such persons, whom they want to meet and interact with while they are on bail as per this order, prior to their release which shall be considered and approved by the learned Special Judge.

6) The petitioners and their sureties shall undertake that the petitioners shall be present before Court on all dates of posting. They shall further undertake that if for any reason - justifiable or otherwise, they are not present before Court to enable the court to proceed with the arguments, hearing on the question of sentence or delivery of judgment, such steps or any other steps remaining in the case can be undertaken without their presence exempting them from their personal appearance. An affidavit of undertaking to that effect shall be filed by the petitioners. In such affidavit, they shall undertake that in the unlikely event of their absence from Court for any reasons justifiable

or otherwise, the Court can proceed with the trial in their absence while simultaneously initiating coercive process against them. It is directed that the Court shall be at liberty to proceed hereafter assuming that the petitioners are present before Court. Such an extra ordinary direction appears to be necessary in the interests of justice and for orderly further progress of the case without interruption and to allay the apprehension aired by the learned D.G.P.

7) The State shall be at liberty to place police surveillance of the petitioners while they are on bail. The State has the duty to ensure that their movements are monitored and any attempt to commit breach of the obligations under this order is not permitted to take place. Alertly the State has to ensure that these conditions are complied with.

16. The petitioners shall not be released from custody on the strength of this order prior to 1.1.2008. In the meantime, they shall file statement/undertaking before the learned Special Judge with copy to the learned D.G.P. The learned Special Judge shall consider whether the conditions have been strictly complied with and then only direct their release from custody on or after 1.1.2008.

17. This order shall not be reckoned as a precedent nor shall it be used as a precedent to justify the claim for bail of any other accused in the same case.

(R. BASANT)
Judge

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